REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT *EX PARTE* SMART & 3 OTHER CASES

HOUSE OF LORDS
LORD KEITH OF KINKEL, LORD LANE, LORD TEMPLEMAN, LORD BROWNE-WILKINSON, LORD MUSTILL
24 JUNE 1993

CRIMINAL LAW: Sentencing - Conviction on a charge of murder - Term of imprisonment - Mandatory life sentence - Appeal on formalities of sentencing process - Release on licence of custodial life prisoners - Penal and risk elements of term of imprisonment - Ascertainment of penal element by Home Secretary - Whether Secretary of State obliged to adopt judicial advice regarding the period to be served for retribution and deterrence - Whether Secretary of State obliged to give reasons for departing from the judicial viewpoint.

The respondents are convicted murderers sentenced to life imprisonment, a sentence which is mandatory under English Law on a procurement of a conviction on a charge of murder. An offender however could be released on licence after serving a determinate term of years. The practice governing the sentencing process for a mandatory life term mitigated by release on licence is divided into 2 elements - the Penal or Tariff element and the Risk element. The Penal element relates to the number of years considered appropriate as a deterrent and retribution measure reflecting the nature and gravity of the offence. The Risk element relates to an indeterminate period which the offender begins to serve when the Penal element is exhausted. The Home Secretary ascertains the Penal element, which fixes at one remove the minimum period for which the convicted murderer will be detained. The role of Judges are merely as advisers in this particular sentencing process.

The respondents' intention in filing an appeal is to endeavour to ascertain why a particular term of years was selected in each of their cases.

The underlying point in all six issues raised related to the Home Secretary's role in ascertaining the Penal element. The respondents argued that the Judges were uniquely skilled and experienced "in matching punishment to the needs of retribution and deterrence" and fixing the tariffs for the offences. The issue therefore arose as to

(a) Whether the Secretary of State was obliged to adopt the judicial view on the period fixed and intended as a retribution and deterrence measure (the Penal or Tariff element).

(b) If he was not obliged to accept the judicial view, was the Secretary of State obliged to give reasons for departing from it (referred to in the judgment as Issue No. 3).

Held:

[1] The proposition that the Judges are specially qualified to assess the Penal element of a mandatory life sentence is questionable. Where a **mandatory**, as opposed to a discretionary, life term is concerned, the practice has been that the Home Secretary has been the individual who has decided and developed his own ministerial ideas on what the public interest demands. In addition to this, Parliament has not by statute conferred on the Judges any role, even as advisors, at the time when the Penal element of a mandatory sentence is fixed. The Secretary of State is compelled, or at least entitled, to have regard to broader considerations of a public character than those which apply to an ordinary sentencing function.

[2] It is the openness of the Home Secretary's decision in fixing the tariff which is essentially in dispute and the issue is whether the scheme which is administered is administered in a way which falls below the minimum standard of fairness. Where an administrative power is exercised, it carries with it a presumption that it will be exercised in a way which is fair in all the circumstances of the case bearing in mind the standards of fairness are not immutable and may change with the passage of time. However, fairness often demands that the opportunity to make representations will be accorded to the person who may be adversely affected by the decision. The opportunity is to be given either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. To enable the person affected to make worthwhile representations, fairness will often require that he be informed of the gist of the case which he is to answer.

[3] The decision by the Home Secretary to fix the Penal element on occasions will involve a

divergence from the Judges' opinion. In making his decision, he should take into account all relevant considerations, amongst which are the opinions of the Judges. A departure from the opinion of the Judges are relevant as tending to show either that the Home Secretary has failed to take their opinion into account, or that the discrepancy is so wide as to suggest the decision may have been irrational.

A life prisoner whose future depends vitally on the decision of the Home Secretary as to the Penal element possesses the right to know what factors the Home Secretary will take into account, in making his decision for otherwise there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered.

To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the Penal element, the prisoner has virtually no means of ascertaining whether the decision-making process in a particular case has gone astray. There should be an effective way to detect the kind of error which would entitle the Court to intervene and for this purpose the reasoning of the Home Secretary should be disclosed.

The respondents are entitled to the declaration that the Secretary of State is obliged to inform the prisoner of the Penal period recommended by the judiciary and any other opinion relevant to the Home Secretary in arriving at a decision and he is further obliged to give reasons for any departure from the judicial viewpoint.

[Appeal and cross-appeal dismissed save as to Issue 3 of the cross-appeal. Declarations as above].

Cases referred to:
Reg v. Hodgson [1967] 52 Cr. App. R. 113 ***(refd)***
Reg v. Wilkinson [1983] 5 Cr. App. R. (S) 105 ***(refd)***
Reg v. Secretary of State for the Home Department, Ex parte Handscomb [1987] 86 Cr. App. R. 59 ***(refd)***
Thynne, Wilson and Gunnel v. United Kingdom [1990] 13 EHRR 666 ***(refd)***
Reg v. Parole Board, Ex parte Wilson [1992] QB 740 ***(refd)***
Payne v. Lord Harris of Greenwich [1981] 1 WLR 754 ***(refd)***
Reg v. Secretary of State for the Home Department, Ex parte Walsh The Times, 18 December 1991 ***(refd)***
Kanda v. Government of Malaya [1962] AC 322, 337 ***(refd)***
Reg v. Civil Service Appeal Board, Ex parte Cunningham [1991] 4 All ER 310 ***(refd)***
Reg v. Secretary of State for the Home Department, Ex parte Oladehinde [1991] 1 AC 254 ***(refd)***

Legislation referred to:
Abolition of Death Penalty Act 1965, s. 1(1), (2)
Criminal Justice Act 1991, ss. 1(4), 2(1), 34, 35, 39(3)
Criminal Justice Act 1967, s. 59
Homicide Act 1957
Prison Act 1952

Other sources referred to:
Practice Direction (Crime: Life Sentences), section 34: 8 February 1993, 1 WLR 223

JUDGMENT

Lord Keith of Kinkel

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend Lord Mustill, which I have read in draft and with which I agree. I would dismiss the appeal, and the cross-appeal save as to issue 3 which I would allow and make the declarations he proposes.

Lord Lane

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Mustill. I agree with his reasoning and conclusions. I would accordingly dismiss the appeal and cross-appeal, save that I would allow the cross-appeal on issue 3 as defined by Lord Mustill and make the declarations which he proposes.

Lord Templeman

My Lords,

For the reasons given by my noble and learned friend Lord Mustill I would dismiss the appeal and cross-appeal, save that I would allow the cross-appeal on issue 3 defined by Lord Mustill and make the declarations he proposes.

Lord Browne-Wilkinson

My Lords,

For the reasons given by my noble and learned friend Lord Mustill I would dismiss the appeal and dismiss the cross-appeal save as to issue 3 which I would allow and make the declarations which are proposed by Lord Mustill.

Lord Mustill

My Lords,

The sentencing of a convicted murderer according to English law is a unique formality. Although it is a very grave occasion it is a formality in this sense, that the task of the judge is entirely mechanical. Once a verdict of guilty is returned the outcome is pre-ordained. No matter what the opinion of the judge on the moral quality of the act, no matter what circumstances there may be of mitigation or aggravation, there is only one course for him to take, namely to pass a sentence of life imprisonment.

This purely formal character of the sentencing process is unique in more than one respect. Thus, whilst it is true that there are other, comparatively unimportant, offences where a particular sentence, or component of a sentence, is prescribed by law there is in practice no other offence besides murder for which a custodial sentence is mandatory. This singularity is not to be accounted for by the fact that the crime has resulted in the death of the victim, since although the offence of manslaughter carries a maximum penalty of life imprisonment the sentence is discretionary and the maximum is rarely imposed; and other offences in which the death of the victim is an element are subject to maximum fixed terms. Nor can the uniqueness of the mandatory sentence of murder be ascribed to the uniquely wicked quality of the intent which accompanies the fatal act, since as every law student knows, although many who speak in public on the subject appear to overlook, it is possible to commit murder without intending to kill, and many of those convicted of murder have intended to do no more than commit grievous bodily harm. In truth the mandatory life sentence for murder is symbolic.

The sentence of life imprisonment is also unique in that the words which the judge is required to pronounce do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or the intended effect of a sentence of life imprisonment, as a judge faced with a hard case will take pains to explain to the offender before sentence is passed. But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations to, and executive decisions by, the Home Secretary, some made at an early stage and others much later, none of which can be accurately forecast at the time when the offender is sent to prison.

There is, however, another form of life sentence, of which the philosophy, statutory framework and executive practice are quite different even though the words pronounced by the judge are the same. This is the discretionary life sentence. The imposition of this sentence is severely constrained by s. 2(1) of the Criminal Justice Act 1991, read with s. 1(2), and by decisions of the Court of Appeal (Criminal Division), notably *Reg. v. Hodgson* [1967] 52 Cr. App. R. 113 and *Reg. v. Wilkinson* [1983] 5 Cr. App. R. (S) 105. Where the criteria so established are satisfied the judge has a choice between two very different procedures. He may decide to focus on the offence, passing a sentence appropriate to its gravity by the familiar process of identifying the range of sentences established through decisions of the Court of Appeal as being in general apposite to an offence of the kind in question, and then placing the individual offence within (or exceptionally outside) the range by reference to circumstances of mitigation or aggravation. The judge may however think it right to adopt a different approach, and to concentrate on the offender rather than the offence, imposing a sentence of life imprisonment to reflect his appraisal that even a long fixed term of years may not adequately protect the public against the risk that when the term has been served the prisoner will continue to be a danger to the public. Such a sentence ensures that the prisoner will be kept in custody until it is thought safe to release him.

The discretionary life sentence may thus be regarded as the sum of two sentences, to be served consecutively. First, a determinate number of years appropriate to the nature and gravity of the offence. This is often called the "tariff" element of the sentence. For my part, although I recognise that this is not inappropriate in the context of a discretionary life sentence, I consider that for reasons which I will later develop it is illogical and misleading when the usage is transferred to a mandatory sentence. I therefore prefer to avoid this terminology and will instead call the first component of the life sentence the "penal element". The second component is an indeterminate period, which the offender begins to serve when the penal element is exhausted. I will call this the "risk element".

In the past there was no need for the sentencer to give separate attention to these two components. Having once decided that a determinate sentence at the general level suggested by the nature of the offence would not adequately reflect the degree of risk, he would proceed directly to the imposition of a life sentence, and would have no reason to identify with precision, or to publish, the fixed term which he would have passed if he had chosen the alternative course. As will appear, the law and practice have more recently developed in a way which attaches great importance to the composite nature of the discretionary life sentence, and now requires that in the great majority of cases the judge will quantify and announce the penal element and will thereby fix directly the minimum period in custody which the offender must serve, before the question whether it is safe to release him becomes decisive. Although it is a comparative novelty this regime conforms very well with the rationale of the discretionary life sentence and, as it appears to me, is fair, practical in operation and easy to comprehend.

The same cannot I believe be said of the situation created by the ministerial decision, some ten years ago, to import the concept of a penal element into the theory and practice governing the release on licence of prisoners serving mandatory life sentences for murder. I must develop this later. For the present it is sufficient to state that the current practice, established by executive changes of policy rather than by Act of Parliament, now requires the division of the sentence into penal and risk elements, and entails that the ascertainment by the Home Secretary of the penal element fixes, at one remove, the minimum period for which the convicted murderer will be detained. It is to this element that the present appeal is directed.

The respondents to the appeal, S. Doody, J.D. Pierson, E.W. Smart and K. Pegg were each convicted of murder and sentenced to life imprisonment on various occasions between 1985 and 1987. It is possible to deduce from the dates fixed by the Secretary of State for the Home Department for the first review of their cases by the Parole Board (and in the case of Pierson from correspondence with the Home Office) that the penal elements of these life sentences fixed by Secretary of State were respectively 15 years; not more than 20 years; 12 years; and 11 years. So much each prisoner knows, but what he does not know is why the particular term was selected, and he is now trying to find out: partly from an obvious human desire to be told the reason for a decision so gravely affecting his future, and partly because he hopes that once the information is obtained he may be able to point out errors of fact or reasoning and thereby persuade the Secretary of State to change his mind, or if he fails in this to challenge the decision in the courts. Since the Secretary of State has declined to furnish the information the respondents have set out to obtain it by applications for judicial review. The relief claimed is not the same in each case, but the applications have sufficient in common to enable the parties to identify six issues for decision. In the Court of Appeal the respondents succeeded on the first two issues, on which the Secretary of State now appeals. The respondents failed, and cross-appeal, on the remaining four issues. As the argument developed it came to appear that the issues as agreed were not entirely in focus, but they form a useful framework for decision and I will set them out. First however it is essential to describe, not only the current law and practice, but also the steps by which they reached their present form.

HISTORY

A. Chronology

1. Until the enactment of the Homicide Act 1957 the mandatory sentence for murder was death. This was mitigated by an executive power to commute the sentence to one of penal servitude (later imprisonment) for life, which in turn was subject to an executive power to release the prisoner on licence. There was a long-established practice whereby the trial Judge wrote privately to the Home Secretary drawing attention to any features of the case which he considered relevant to the anxious decision on whether or not to commute.

2. When the Act of 1957 created the category of non-capital murder it prescribed a mandatory sentence of imprisonment for life. Eight years later, at the time when the abolition of the death penalty for murder was before Parliament it was proposed that the previous mandatory sentences of death and life imprisonment should be replaced by a discretionary sentence of life imprisonment, but Parliament did not agree and a sentence of life imprisonment was made mandatory for all murders: Murder (Abolition of Death Penalty) Act 1965, s. 1(1). At the same time two statutory concessions were made to

those who feared excessive leniency by the Executive in the treatment of convicted murderers. First, by s. 1(2) the trial Judge was given power to recommend to the Home Secretary the minimum period which should elapse before the release of the prisoner under the statutory power to release on licence which had been created by the Prison Act 1952. Second, it was stipulated that no person convicted of murder would be released on licence unless the Home Secretary had previously consulted the Lord Chief Justice and the trial Judge, if available: section 2.

3. Two years later, the Parole Board was created by the Criminal Justice Act 1967. As part of the new scheme the provision for consultation with the Lord Chief Justice and the trial Judge was repealed and replaced by a similar requirement, on this occasion made applicable to discretionary as well as mandatory life sentences, and coupled with a condition that the Home Secretary should not release the prisoner unless he was recommended to do so by the Parole Board. In practice the advice of the Parole Board was not obtained (in the absence of exceptional mitigating circumstances) until the Board conducted a first review of the prisoner's sentence after seven years of custody; and the opinion of the Lord Chief Justice and the trial Judge (whom I will hereafter call "the judges") was not at this stage sought unless a recommendation by the Board for release was seriously in prospect.

4. Because it was found that in the majority of cases a first review after seven years was too early to set a release date, a new procedure was devised in 1973 whereby a joint working group of the Parole Board and the Home Office scrutinised the case of each life prisoner after the first three years in order to recommend a date of the first review by the Parole Board. We see here the origins of the crucial practical distinction between setting a date for release and setting a date of the first consideration of release. Throughout this period trial Judges continued to write privately to the Home Secretary expressing their opinions on the offence and the offender, although the practice of making recommendations as to minimum sentence, permitted by s. 1(2) of the Act of 1965 steadily diminished.

5. So matters continued until 1983, when in response to pressure of public opinion the Home Secretary (Mr. Leon Brittan) announced a series of radical changes in the existing policies relating to the release of prisoners on parole and licence (49 HC (5th Series) 505-508: written answer). These included the creation of a completely new philosophy and practice for the release of life prisoners on licence, some aspects of which had been discussed with the Lord Chief Justice, and which had been foreshadowed in a speech to the Conservative Party conference. This practice was to have the following features:

(i) The joint Home Office/Parole Board committee, which had been established to recommend the date for the first review by the Parole Board was disbanded.

(ii) Instead, the Home Secretary would himself, after consulting the judges "on the requirements of retribution and deterrence", fix the date for the first review.

(iii) The review would normally take place three years before the expiry of the "period necessary to meet the requirements of retribution and deterrence". This would give sufficient time for preparations for release, if the Parole Board were to recommend it.

(iv) Subject to exceptional circumstances the first review would in fact take place on the date so fixed.

(v) Meanwhile the progress of the prisoner would be kept under regular review by the Home Office.

(vi) The consultation with the judges required by s. 61 of the Criminal Justice Act 1967 would take place when release was an actual possibility.

(vii) In the case of certain types of murder the prisoner would not normally be released until 20 years or even longer had been served.

Equally important were the changes in philosophy underlying the new practice. The first was tacit, but obvious. Whereas at the outset the power of the trial Judge to recommend a minimum term, and the duty of the Home Secretary to consult the judges before release had been a protection against a foreseen risk of excessive leniency by the Executive, the new regime was intended to forestall excessive leniency by the judges, or the Parole Board, or both. The second change in philosophy was made explicit in the following passage from the Home Secretary's announcement:

> These new procedures will separate consideration of the requirements of retribution and

> deterrence from consideration of risk to the public, which always has been, and will continue to be, the pre-eminent factor determining release. ... They will enable the prison and other staff responsible for considering and reporting on life sentence cases, the local review committees and the Parole Board, to concentrate on risk. The judiciary will properly advise on retribution and deterrence. But the ultimate discretion whether to release will remain with me.

Thenceforth the separation between risk to the public and the penal element, applied to mandatory and discretionary life sentences alike (480 HL (5th Series) 904: written answer) was firmly embedded in the theory and practice of the release of life prisoners. The advice of the Judges, previously expressed in the round by reference to all the features of the offence and the offender which the judges considered to be relevant, was now to be confined to the penal element.

6. This regime was soon modified. In the first place, special provision was made for prisoners, the penal element of whose sentences exceeded 20 years. Here, the first Parole Board review was to take place, not three years before the expiry of the penal element, but after 17 years in custody. The second modification was prompted by the decisions of the Divisional Court in *Reg. v. Secretary of State for the Home Department, Ex parte Handscomb* [1987] 86 Cr. App. R. 59, to the effect that the Home Secretary was acting unlawfully by delaying until three years after sentencing his consultation with the judiciary for the purpose of fixing the first review date, and also that he was bound to set the first review date strictly in accordance with the penal element recommended by the Judges. In response to this decision the Home Secretary (Mr. Douglas Hurd), in agreement with the Lord Chief Justice, decided (120 HC (5th Series) 347-349: written answer) that in future the trial Judge's view on the penal element of a discretionary life sentence should be obtained (through the Lord Chief Justice) as soon as practicable after the imposition of sentence, and that the first Parole Board review would be fixed in accordance with the judicial view. As regards mandatory life sentences the practice would also be changed so as to eliminate the waiting period of three years, but the Home Secretary went on to add:

> In cases of prisoners serving life sentences for murder, where the sentence is not at the discretion of the court, the question of the notional equivalent determinate sentence does not arise. I shall continue to take into account the view of the judiciary on the requirements of retribution and deterrence in such cases as a factor amongst others (including the need to maintain public confidence in the system of justice) to be weighed in the balance in setting the first review date. I shall ensure that the timing of the first formal review in such cases is fixed in accordance with my overall policy for ensuring that the time served by prisoners serving life sentences for the worst offences of violence fully reflects public concern about violent crime.

7. The next development was the judgment of the European Court of Human Rights in *Thynne, Wilson and Gunnel v. United Kingdom* [1990] 13 EHRR 666, concerning discretionary life sentences. Here, the Court recognised the theoretical distinction between mandatory and discretionary sentences, and went on to hold (*inter alia*) that in the case of a discretionary sentence once the penal element had been served the prisoner was entitled to "judicial control" of his continued detention.

8. Just as it had reacted to criticisms in *Handscomb* the Government responded to *Thynne, Wilson and Gunnell* with a modification of the existing practice governing discretionary life sentences, which was subsequently embodied in s. 34 of the Criminal Justice Act 1991. The gist of the new statutory regime is that the judge has power to make an order specifying the penal element of the sentence and at the same time to order that s. 34 shall apply to the prisoner as soon as he has served that element. Where the section does apply the Home Secretary, if he has not already done so of his own accord, can be required by the prisoner to refer his case to the Parole Board once the penal element has expired. The Board then considers whether it is any longer necessary for the protection of the public that the prisoner should be confined, and if it is answered in the negative it has power to direct the prisoner's release, whereupon it is the duty of the Home Secretary to release him. This section came into force on 1 October 1992 (after the decision of the Court of Appeal in the present case), and the Lord Chief Justice has subsequently directed that save in the very exceptional case the judge should make an order under section 34: Practice Direction of 8 February 1993: **Practice Direction (Crime: Life Sentences)** [1993] 1 WLR 223. The trial Judge will also, as in the past, make a written

report to the Home Secretary, through the Lord Chief Justice.

9. At the time when the Criminal Justice Bill was under consideration it was proposed in the House of Lords that similar provision should be made in the case of mandatory life sentences, but this view was rejected. The Minister of State (Mrs. Angela Rumbold) stated:

> Mandatory life sentence cases, however, raise quite different issues and the Government do not agree that it is appropriate to extend a similar procedure to these cases. In a discretionary case, the decision on release is based purely on whether the offender continues to be a risk to the public. The presumption is that once the period that is appropriate to punishment has passed, the prisoner should be released if it is safe to do so. The nature of the mandatory sentence is different. The element of risk is not the decisive factor in handing down a life sentence. According to the judicial process, the offender has committed a crime of such gravity that he forfeits his liberty to the state for the rest of his days - if necessary, he can be detained for life without the necessity for subsequent judicial intervention. The presumption is, therefore, that the offender should remain in custody until and unless the Home Secretary concludes that the public interest would be better served by the prisoner's release than by his continued detention. In exercising his continued discretion in that respect, the Home Secretary must take account, not just of the question of risk, but of how society as a whole would view the prisoner's release at that juncture. The Home Secretary takes account of the judicial recommendation, but the final decision is his.
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> (195 HC (Fifth Series) 309)

10. Reflecting this policy, the Criminal Justice Act 1991 provides differently in s. 35 for mandatory life prisoners from the new regime established by s. 34 for discretionary life prisoners. Under s. 35 the discretion to refer the case to the Parole Board is left with the Home Secretary. It is only if (a) the Home Secretary has chosen to refer, (b) the Parole Board has recommended release, and (c) the Home Secretary has consulted the judges, that he has power to release the prisoner; but this is not a power which he is bound to exercise. The existing practice whereby the Home Secretary fixes the date of first review by reference to the penal element, after consultation with the judges, remains in place.

11. Most recently, there have been important developments in the practice governing the review by the Parole Board. It appears that by the time the Minister of State made her announcement on 16 July 1991 the Government had already decided that a discretionary life prisoner should be entitled to full disclosure of the materials to be placed before the Board. Indeed, before this practice was put into effect it was held by the Court of Appeal in *Reg v. Parole Board, Ex parte Wilson* [1992] QB 740 that this is what the law required. Subsequently, on 16 December 1992 the Home Secretary has announced that the practice for mandatory life prisoners will be brought into line with these changes, so that the prisoner will now be provided in advance with all papers to be considered by the Parole Board for the review of his case (subject to public interest immunity), and afterwards with the reasons for the Parole Board recommendations and ministerial decisions regarding release. (216 HC (5th Series) 218-219: written answer).

2. The current law and practice

My Lords, I believe that this summary has shown how, in contrast with the position as regards discretionary life sentences, the theory and the practice for convicted murderers are out of tune. The theory - and it is the only theory which can justify the retention of the mandatory life sentence - was restated by Mrs. Rumbold less than two years ago. It posits that murder is an offence so grave that the proper "tariff" sentence is invariably detention for life, although as a measure of leniency it may be mitigated by release on licence. Yet the practice established by Mr. Brittan in 1983 and still in force founds on the proposition that there is concealed within the life term a fixed period of years, apt to reflect not only the requirements of deterrence, but also the moral quality of the individual act ("retribution"). These two philosophies of sentencing are inconsistent. Either may be defensible, but they cannot both be applied at the same time.

I make this point, not to argue for one regime rather than another, nor to suggest that each of them is unsatisfactory. This is a question for Parliament and we must take the law as it stands. The importance of the inconsistency for present purposes is that the choice of the theory goes a long way towards determining the requirements of fairness with which the practice should conform. The judgment of Shaw LJ in *Payne v. Lord Harris of Greenwich* [1981] 1

WLR 754, a case on the right of a mandatory life prisoner to know the Parole Board's reasons for declining to recommend his release, illustrates this well. In a crucial passage, concerned with the grant of parole in general but particularly germane in the present context., the Lord Justice stated, at p. 763, that :

> A person sentenced to imprisonment could not **expect** to be released before the expiry of his sentence. Since the introduction of parole he may **hope** that part of his sentence may be served outside prison. If his offence was of a heinous kind, even that hope will be a frail one.

If the matter is approached in this way the Home Secretary can be regarded as exercising a very broad general discretion, in which all the relevant factors are weighed together when deciding whether the public interest permits release, in very much the same way as the discretion had been exercised before the Parole Board came on the scene; and from this it is not a long step to hold that since the prisoner is essentially in mercy there was no ground to ascribe to him the rights which fairness might otherwise demand. This reasoning is however much weakened now that the indeterminate sentence is at a very early stage formally broken down into penal and risk elements. The prisoner no longer has to hope for mercy but instead knows that once he has served the "tariff" the penal consequences of his crime have been exhausted. Even if the Home Secretary still retains his controlling discretion as regards the assessment of culpability the fixing of the penal element begins to look much more like an orthodox sentencing exercise, and less like a general power exercised completely at large.

For this reason I believe it impossible to proceed any distance towards determining the present appeal without deciding which of the two competing philosophies is to form the starting-point. As it seems to me, the only possible choice is the regime installed by Mr. Brittan, as later modified. This is the regime by which successive Home Secretaries have chosen to exercise the wide powers conferred by Parliament, and the arguments have throughout assumed that the regime is firmly in place, and that the task of the courts is to decide what the elements of fairness demand as to the working-out of that regime, in the light of the sentencing philosophy which is expressed to underlie it. This being so I think it essential not to cloud the discussion by introducing the inconsistent theory enunciated by the Minister of State, and I shall leave this entirely out of account.

In this long introduction I have anticipated much of what needs to be said about the six individual issues identified by the parties. For reasons which I will shortly explain., it is convenient to deal with these in a different order from that chosen by the parties, but I will first set them out.

The Issues

(1) Is a prisoner serving a life sentence entitled to make written representations before his tariff is set by the Secretary of State?

(2) Is the Secretary of State required to tell the prisoner what period the Judiciary have recommended he should serve for the purposes of retribution and deterrence, and of any other opinion expressed or reasons given by the Judiciary which are or may be relevant to the Secretary of State's decision as to the appropriate period to be served for these purposes?

(3) If a prisoner is to be told the judicial view of his tariff, is the Secretary of State obliged to give reasons for departing from it if he does so?

(4) Is the Secretary of State obliged to adopt the judicial view of the period to be served for retribution and deterrence by a prisoner serving a mandatory life sentence?

(5) Is the Secretary of State obliged to make the decision on the period which a life sentence prisoner should serve for the purposes of retribution and deterrence personally, or may this task be performed by a Minister of State of the Home Office on his behalf?

(6) In relation to Mr. Pegg only, did the Secretary of State fail to take into account the contents of his Petition dated 24 January 1989.

Issue 4: The Effect Of The Judges' Advice

Although the fourth of these questions arises under the cross-appeals, logically it comes first. All the judges of the Divisional Court and the Court of Appeal have returned a negative answer, and I have no doubt that they are right.

Under the current practice the opinion of the trial Judge on the penal element plays a very different part in the two regimes. For the discretionary sentence an order under s. 34 is decisive.

The opinion of the Lord Chief Justice is not required, and the Home Secretary has no choice but to initiate a Parole Board review once the term fixed by the judge has expired. With a mandatory sentence the trial Judge and the Lord Chief Justice are no more than advisers. Not only have successive Ministers made it plain to Parliament that they regard themselves as free to depart from the advice but they have put their words into practice, for statistics furnished to the Select Committee on Murder and Life Imprisonment showed that during specimen periods of six months between 1984 and 1988 the Home Secretary fixed the penal element at a longer term than recommended by the trial Judge in between 30 and 60 per cent of the cases. The respondents maintain that this practice is unlawful. They put their argument in two ways.

First, they assert that the judges are uniquely skilled and experienced in matching punishment to the needs of retribution and deterrence, and in the establishment and operation of tariffs for particular types of offence. This being so, the Home Secretary who *ex hypothesi* is less well equipped cannot sensibly reject the advice of the judges, so that any fixing of the penal element otherwise in an accordance with their opinions (or, presumably, of the Lord Chief Justice if the judges differ) must necessarily be irrational. In support, the respondents rely on the decision of the Divisional Court in *Handscomb*, 86 Cr. App. Rep. 59. In the judgments now under appeal much attention was given to identifying the *ratio decidendi* of this case, in the light of pronouncements by the Divisional Court and by Lloyd LJ in *Reg. v. Secretary of State for the Home Department, Ex parte Walsh* The Times, 18 December 1991. I believe that your Lordships are free to pass by this dispute and to tackle the question afresh. So doing, I would reject the respondents' argument on two grounds. In the first place, I question the proposition that the judges are specially qualified to assess the penal element of a mandatory life sentence: I emphasise mandatory, because there are grounds for saying that in fixing the penal element of the discretionary sentence (with which *Handscomb* was concerned) the judge is simply pronouncing the tariff sentence which he would have imposed but for the element of risk, and that this is the kind of function in which the judiciary has unrivalled experience. But the position as to mandatory sentences is very different. Until Mr. Brittan completely changed the rules in 1983 the idea of a separate determinate penal element-co-existing with the life sentence would have been meaningless. It is true that for the past ten years the judges have been asked to advise upon it, and it may be that some consistent judicial practice now exists. Nevertheless, it is the Home Secretary who decides, and who has developed (with his predecessors) his own ministerial ideas on what the public interest demands. I can see no reason why the anomalous task of fixing a "tariff" penal element for an offence in respect of which the true tariff sentence is life imprisonment is one for which the Home Secretary and his junior ministers, informed by his officials about the existing departmental practice, are any less experienced and capable than are the judges.

In any event, however, even if the respondents' argument is correct so far, it must in my opinion fail because Parliament has not by statute conferred on the judges any role, even as advisors, at the time when the penal element of a mandatory sentence is fixed. But for the fact that the Home Secretary decided, when formulating the new scheme, to retain in a modified shape the existing practice of inviting the opinion of the judges, they would never enter the picture at all. The Secretary of State is compelled, or at least entitled, to have regard to broader considerations of a public character than those which apply to an ordinary sentencing function. It is he, and not the judges, who is entrusted with the task of deciding upon the prisoner's release, and it is he who has decided, within the general powers conferred upon him by the statute, to divide his task into two stages. It is not, and could not be, suggested that he acted unlawfully in this respect and I can see no ground whatever for suggesting that by doing so he deprived himself entirely of his discretion at the first stage, and delivered it into the hands of the judges. If the decision in *Handscomb* is to a contrary effect, then with due respect to a very experienced court, I must disagree.

The respondents' second argument is an appeal to symmetry. Mandatory and discretionary sentences are now each divided into the two elements. Under both regimes the judges play a part in fixing the penal element, and the Parole Board in fixing the risk element. At the stage of the Parole Board Review the practice as to the disclosure of materials and reasons is now the same under the two regimes. Given that the

post-*Handscomb* practice, embodied in s. 34 of the Act of 1991, now gives a direct effect to the trial Judge's opinion, it is irrational (so the argument runs) for the Home Secretary not to have brought into alignment the two methods of fixing the penal element.

Whilst there is an important grain of truth in this argument, I believe it to be over-stated. The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and the current practice there remains a substantial gap between them. It may be - I express no opinion -that the time is approaching when the effect of the two types of life sentence should be further assimilated. But this is a task for Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the state, through the medium of judicial review.

Issues 1, 2 and 3
Representations By The Prisoner:
The Judge's Tariff:
The Home Secretary's Reasons

I take these issues together, partly because they lie at the heart of the appeal, and partly because if they are considered individually attention may be distracted from the real point of the case. Naturally enough, in the light of *Handscomb*, the judicial opinion on the penal element has loomed large in these proceedings, for if the court were to adopt in relation to mandatory life sentences the same approach as in *Handscomb* the prisoner would achieve a large part of what he seeks. But once it is concluded that the judicial opinion is not conclusive, and that it is the decision of the Secretary of State that matters, the opinion of the judges becomes no more than a component of the entire body of material in the light of which that decision is made.

Thus, although it is tempting to approach the question of disclosure and reasons as if it were the judges' opinions to which the applications for judicial review are directed this is mistaken. It is the decision of the Home Secretary which vitally affects the future of the prisoner, and it is the openness of this decision which is essentially in dispute. Although the shape of the arguments presented in the courts below led those courts to begin the inquiry with the judges' opinions, and hence to progress to the reasons for those opinions, and finally to a consideration of whether the reasons of the Home Secretary for departing from the judges' opinions should be disclosed, I prefer to go directly to the opposite end of the process to consider the prisoner's rights in relation to the decision by the Home Secretary. I emphasise once again that the Court is not being asked to review and could not with any hope of success be asked to review this scheme in its entirety, the more so since the judges have themselves been playing an important part in it for the past ten years. Nor of course is it the task of the court to say how it would choose to operate the scheme if given a free hand. The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness.

What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that:

1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

My Lords, the Secretary of State properly accepts that whatever the position may have been in the past these principles apply in their generality to prisoners, including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way. Conversely, the respondents acknowledge that it is not enough for them to persuade the Court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The Court must constantly bear in mind that it is to the decision maker, not the Court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.

I return to the three issues, and to my suggestion that they concentrate attention too much on the judges' opinion on the penal element at the expense of the Home Secretary's decision upon it. The third issue illustrates this well, for the premise of the respondent's argument is that the decision of the Home Secretary which attracts the demands of fairness and which is potentially the subject of review is a decision to depart from the opinion of the judges. This is not so. The decision is simply to fix the penal element. On occasions this will involve a divergence from the judges; on others, not. In each case the requirements of fairness and rationality will be the same. So also are the familiar requirements that the decision-maker should take into account all relevant considerations, amongst which are the opinions of the judges; that he should not take into account irrelevant considerations; and that his decision should be rational. A departure from the opinion of the judges may be relevant as tending to show either that the Home Secretary has failed to take their opinion into account, or that the discrepancy is so wide as to suggest that the decision may have been irrational - although of course the court would not make the mistake of assuming that the judges were necessarily "right", and that accordingly the Home Secretary must necessarily be "wrong", and so wrong that the court can properly interfere.

Accordingly, I prefer to begin by looking at the question in the round, and inquiring what requirements of fairness, germane to the present appeal, attach to the Home Secretary's fixing of the penal element. As general background to this task, I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon "transparency", in the making of administrative decisions. This tendency has been accompanied by an increasing recognition, both in the requirements of statute (c.f. section 1(4) of the Act of 1991) and in the decisions of the Criminal Division of the Court of Appeal, that a convicted offender should be aware what the court has in mind for his disposal. Whilst the current law and practice concerning discretionary life sentences conform entirely with this trend, the regime for mandatory life prisoners conspicuously does not. Should this distinction be maintained in its entirety? Contending on behalf of the Secretary of State that matters should be left as they are, Mr. Pannick first points to the creation by Parliament of express statutory rights, similar to those which might otherwise have come into existence through an implied obligation of fairness, and maintains that these leave no room to imply any further rights. Thus, the prisoner was entitled under s. 59 of the Act of 1967 (now obsolete and repealed) to make representations to the Parole Board in relation to his release on parole, either orally through the medium of an interview with a member of the local Review Board or in writing. Furthermore, in relation to his recall from licence the prisoner is still enabled to make representations and to know the reasons for the revocation of his licence: see s. 39(3) of the Act of 1991, re-enacting provisions of the Act of 1967.

The logic of this argument appears to demand that the prisoner's right to make representations is excluded in all cases except those just mentioned, an extravagant proposition for which the Secretary of State does not contend. But in any event I find it impossible to accept that these limited and fragmentary statutory rights demonstrate a Parliamentary intention to exclude all other aspects of fair treatment, the more so since the provisions originate in an Act passed 16 years before the formal separation of the penal and risk elements, and the ascription to the former of such a decisive influence on the future of the prisoner.

A similar argument is advanced on the broader ground that since Parliament has by s. 34 established a regime which assures discretionary life prisoners of important rights, whilst

leaving untouched the Home Secretary's much more general powers in relation to mandatory prisoners, no new rights in this field should be created by judicial implication. The Secretary of State calls up the decision of the House of Lords in *In re Findley* [1985] AC 318, which was concerned with another aspect of Mr. Brittan's change in policy, to emphasise how careful the courts must be not to impose on a statutory general discretion constraints which Parliament has chosen not to create. Whilst I bear this warning carefully in mind, I cannot accept the argument. Even in relation to discretionary life prisoners, s. 34 does not exhaust the rights stemming from the general principle of fairness: as witness *Reg. v. Parole Board, Ex parte Wilson,* [1992] QB 740 the reasoning of which I adopt in full.

One further argument for the Secretary of State must be mentioned: namely that since the prisoner already knows all the circumstances of his offence, in the light of which the trial Judge made his recommendation on the penal element, he can deduce without the need for any more information both the factual basis of the Secretary of State's decision, and the intellectual reasons why the penal element was fixed at a particular term of years. Although something akin to this argument has found favour in other cases, I am quite unable to accept it here. The prisoner does indeed know what primary materials were before the court, but he does not know what the judge and the Home Secretary made of them, nor does he know what other materials, not brought out at the trial, may have formed an element in the decision. That the choice of the penal element is not self evident appears quite clearly from the number of occasions on which the Home Secretary's appraisal differs from that of the judges. Either there is something in the material before the Home Secretary which was not known to the judges, or the Home Secretary approaches his task in a way which is different from that adopted by the judiciary when passing sentence. In either event, the missing factor is hidden from view, and the prisoner can do no more than guess what it might be.

My Lords, thus to reject the arguments advanced by the Secretary of State does not in itself mean that the respondents are entitled to succeed on the first three issues: it merely leaves the ground clear to consider what fairness demands. Starting with the first issue, we encounter no problems. It would be impossible nowadays to imagine that a prisoner has no right to address to the Home Secretary reasons why the penal term should be fixed at a lower rather than a higher level, and it is now accepted that the prisoner does have this right. Indeed, the Secretary of State has gone further, by very properly undertaking through Counsel that a statement of this effect will be included in the next edition of "**Life Sentence: Your Questions Answered",** the excellent booklet issued to persons serving life sentences. The only issue is whether the Court should make a declaration to this effect. The Secretary of State may be technically right in saying that the point has never been in dispute, and is therefore inapt for a formal ruling. But this controversy is arid. I am unable to understand what objection the Secretary of State could have to the grant of relief, so long as it is made clear (as I have just made clear) that he has not unworthily argued against an obvious right. In a rapidly-developing area of the law I think it useful for each new area to be formally marked-out, even if in the event it proves uncontroversial. I would therefore uphold the decision of the Court of Appeal on the first issue.

My Lords, I consider that the second and third issues are both aspects of the same question, and that the focus of both is too narrow. The central question is whether the prisoner is entitled to know what materials the Secretary of State will found upon when making his decision and (after the event) how that decision was arrived at. The opinion of the Judges and the reasons for the opinion are important, not because they have any direct effect but because they form part of the corpus of material on which the Home Secretary bases his decision. Similarly, if there is a divergence between the opinion of the judges and the decision of the Secretary of State, the reasons for this divergence are no more than part of the entire reasons which led the Home Secretary to fix a particular term as the penal element.

Approaching the matter in this way, it must be asked whether the prisoner is entitled to be informed of that part of the material before the Home Secretary which consists of the Judges' opinion and their reasons for it. It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged,

will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v. Government of Malaya* [1962] AC 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered.

In the present instance, the opinion of the judges (or opinions, if the Lord Chief Justice differs from the charge judge) are weighed in the balance when the Secretary of State makes his decision. Beyond the fact that the opinion is not invariably decisive (as witness the statistics previously cited) there is no means of knowing how it figures in the Home Secretary's reasoning. That it does so figure is quite plain from the statements by successive ministers from which I have quoted. This being so, I think it clear that the prisoner needs to know the substance of the judge's advice, comprising not only the term of years which they recommended as the penal element, but also their reasons: for the prisoner cannot rationalise his objections to the penal element without knowing how it was rationalised by the judges themselves.

This does not mean that the document(s) in which the judges state their opinion need be disclosed in their entirety. Those parts of the judges' opinions which are concerned with matters other than the penal element (for example any observation by the judges on risk) need not be disclosed in any form, and even in respect of the relevant material the requirement is only that the prisoner shall learn the gist of what the judges have said. This will not necessarily involve verbatim quotation from the advice, although this may often be convenient. If the Home Secretary's duty is approached in this way I doubt whether the fact that in the past the advice has been given in documents intended to be confidential will often prove to be troublesome; and in the few cases where problems do arise it may well be that, upon request, the Judges are prepared to waive the confidentiality of the documents.

In these circumstances I agree with the Court of Appeal on the second as well as the first of the issues. I do, however, have the misfortune to differ on the third.

I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *Reg. v. Civil Service Appeal Board, Ex parte Cunningham* [1991] 4 All ER 310 of the factors which will often be material to such an implication.

Turning to the present dispute I doubt the wisdom of discussing the problem in the contemporary vocabulary of "prisoner's rights", given that as a result of his own act the position of the prisoner is so forcibly distanced from that of the ordinary citizen, nor is it very helpful to say that the Home Secretary should out of simple humanity provide reasons for the prisoner, since any society which operates a penal system is bound to treat some of its citizens in a way which would, in general, be thought inhumane. I prefer simply to assert that within the inevitable constraints imposed by the statutory framework, the general shape of the administrative regime which ministers have lawfully built around it, and the imperatives of the public interest, the Secretary of State ought to implement the scheme as fairly as he can. The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the reverse. This being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not. As soon as the jury returns its verdict the offender knows that he will be locked up for a very long time. For just how long immediately becomes the most important thing in the prisoner's life. When looking at statistics it is easy to fall into the way of thinking that there is not really very much difference between one extremely long sentence and another: and there

may not be, in percentage terms. But the percentage reflects a difference of a year or years: a long time for anybody, and longer still for a prisoner. Where a defendant is convicted of, say, several armed robberies he knows that he faces a stiff sentence: he can be advised by reference to a public tariff of the range of sentences he must expect; he hears Counsel address the judge on the relationship between his offences and the tariff; he will often hear the judge give an indication during exchanges with Counsel of how his mind is working; and when sentence is pronounced he will always be told the reasons for it. So also when a discretionary life sentence is imposed, coupled with an order under s. 34. Contrast this with the position of the prisoner sentenced for murder. He never sees the Home Secretary; he has no dialogue with him: he cannot fathom how his mind is working. There is no true tariff, or at least no tariff exposed to public view which might give the prisoner an idea of what to expect. The announcement of his first review date arrives out of thin air, wholly without explanation. The distant oracle has spoken, and that is that.

My Lords, I am not aware that there still exists anywhere else in the penal system a procedure remotely resembling this. The beginnings of an explanation for its unique character might perhaps be found if the executive had still been putting into practice the theory that the tariff sentence for murder is confinement for life, subject only to a wholly discretionary release on licence: although even in such a case I doubt whether in the modern climate of administrative law such an entirely secret process could be justified. As I hope to have shown, however, this is no longer the practice, and can hardly be sustained any longer as the theory. I therefore simply ask, is it fair that the mandatory life prisoner should be wholly deprived of the information which all other prisoners receive as a matter of course? I am clearly of the opinion that it is not.

My Lords, I can moreover arrive at the same conclusion by a different and more familiar route, of which *Ex parte Cunningham*, [1991] 4 All ER 310 provides a recent example. It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the Court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view. Accordingly, I consider that the respondents are entitled to an affirmative answer on the third issue.

It remains to comment briefly on the decision of the Court of Appeal in *Payne v. Lord Harris of Greenwich* [1981] 1 WLR 754, on the duties of disclosure in relation to the recommendations of the Parole Board. In practical terms this is obsolete, having been overtaken by the changes in law and practice of recent years. The decision is also distinguishable, since it was not, and could not have been, concerned with the penal element. Nevertheless, the reasoning remains intact. With proper respect, I would depart from it for three reasons. First, and most important, because the case was decided before the Home Secretary created a wholly new explanation of the life sentence. The traditional theory, exemplified in the passage already quoted from the judgment of Shaw LJ, no longer corresponds with the practice. Second, because even in such a short time as 13 years the perception of society's obligation towards persons serving prison sentences has perceptibly changed. Finally, because of the continuing momentum in administrative law towards openness of decision-making. Sound as it may well have been at the time, the reasoning of *Payne v. Lord Harris of Greenwich* cannot be sustained today.

Before leaving this question, I wish to make it absolutely clear that if your Lordships are in agreement with this conclusion this will not be a signal for a flood of successful applications for judicial review. I repeat for the last time that Parliament has left the discretion on release with the Home Secretary, and that he has done nothing to yield it up. So long as this remains the case, prisoners should not deceive themselves into believing that they can obtain leave to move for judicial review simply by pointing to a difference between the opinion of the Judges and the

decision of the Home Secretary. Only if it can be shown that the decision may have been arrived at through a faulty process, in one of the ways now so familiar to practitioners of judicial review, will they have any serious prospect of persuading the court to grant relief.

Issue 5: Discretion

On this I have little to add to the judgment of Staughton LJ, the reasoning of which I adopt. That the question whether statutory discretion is capable of delegation, and if so to what degree, principally depends upon the interpretation of the statute is beyond question. Whether there is another constraint as regards the degree of delegation, in the shape of a possible exposure to attack on the ground of irrationality, as suggested by the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Oladehinde* [1991] 1 AC 254 need not be examined here, since it is obvious that if delegation is possible at all, the power to fix the penal element can properly be entrusted to a junior minister. On the question whether the statute contemplates that the Home Secretary, with all his multifarious public duties, is required to exercise his particular discretion personally in every case, I agree with the reasons given by Staughton LJ, and wish to add nothing.

There is one further point. The statutory powers and the administrative regime contemplate that the Lord Chief Justice as well as the Home Secretary has a part to play. It may safely be assumed that in the past the Lord Chief Justice has always considered that he is obliged to act in person. It might be asked why the position of the Home Secretary should be different. In my judgment this argument is out of place. Throughout the statute book there are innumerable instances where powers are conferred on a minister, and where it is perfectly obvious that Parliament contemplated a delegation. By contrast, there are very few instances in which a statute, or delegated legislation, refers to the Lord Chief Justice and in these instances it is equally obvious that the office-holder alone is to act. The two terms are therefore drawn from quite different vocabularies, and I find nothing inconsistent in holding that the one office-holder may delegate, whereas the other may not.

Issue 6: Mr. Pegg's Special Question

Mr. Pegg pursues through Counsel an appeal advanced on very narrow grounds particular to his own case. It involves no question of general principle and is therefore inapt for decision by this House. I will only say that on the material presently before the House I can see no ground for holding either that the Home Secretary misdirected himself as to the nature and purpose of the representations made to him on behalf of Mr. Pegg, or that his decision not to accede to them was irrational. Whether when Mr. Pegg obtains the reasons for the Home Secretary's decision in fixing and maintaining the tariff at the level which he did he may appear to have some ground for complaint which might call for the intervention of the Court is not a matter on which your Lordships can at present express any opinion.

My Lords, as will have appeared I have adopted an approach to the problems of this case rather wider than the issues identified for argument, and set out above, would suggest. Logically, this should lead to declarations expressed in equally broad terms. The respondents have not however sought relief in such terms, and I suggest it would be inappropriate for your Lordships now to make orders which have never been claimed. Accordingly, I propose that your Lordships should simply uphold the two declarations already made by the Court of Appeal and add a third, to reflect the decision in favour of the appellants on the third issue. This will result in an order in the following form:

It Is Declared that:

1. The Secretary of State is required to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period he should serve for the purposes of retribution and deterrence before the Secretary of State sets the date of the first review of the prisoner's sentence.
2. Before giving the prisoner the opportunity to make such representations, the Secretary of State is required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which is relevant to the Secretary of States decision as to the appropriate period to be served for these purposes.
3. The Secretary of State is obliged to give reasons for departing from the period recommended by the judiciary as the period

which he should serve for the purposes of retribution and deterrence.

It is however imperative that these declarations should be read in the context of the reasons for them which I have endeavoured to express.

WEBB DISTRIBUTORS (AUST.) PTY. LTD. & ORS.

v.

THE STATE OF VICTORIA & ANOR.

HIGH COURT, AUSTRALIA
MASON CJ, DEANE, DAWSON, TOOHEY, McHUGH JJ.
[F.C. 93/049]
10 NOVEMBER 1993

COMPANY LAW: Building societies wound up - Non-withdrawable shareholders in societies allege misrepresentation by societies - Shares represented to be redeemable - Rescission of contract of acquisition of shares precluded - Whether shareholders may bring action for damages against societies - Whether unliquidated damages provable in the liquidation of the societies.

The applicants in this appeal were appointed to represent holders of non-withdrawable shares in 3 building societies in Australia which were wound up on 13 December 1990 under s. 122 of the Building Societies Act 1986 (Vic) ("the Act"). The State of Victoria and the appointed liquidator were the respondents. The shareholders' (more than 10,000 in number) grievance was that the nature of the shares subscribed to were represented to them incorrectly in that they were led to believe the shares were redeemable and "like a deposit". The societies operated on a system which was not explained in the prospectus. However the duty of the Court was not to pass judgment on whether or not the societies had acted deceptively (the Court was asked to assume thus) but to address 2 underlying issues:

(1) Whether unliquidated damages claimed by the shareholders were provable in the liquidation of the societies; and
(2) Whether, since the share holders were precluded from rescinding the contract of acquisition of their shares, they were thereby precluded from claiming damages on the contract.

In submitting on these points the appellants contended that the '*Houldsworth*' Principle did not apply to building societies. In *Houldsworth v. City of Glasgow Bank* [1880] 5 App Cas 317, it was propounded that a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company.